Filed 7/10/12 In re Wendy C. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re WENDY C., a Person Coming Under the Juvenile Court Law.	B237376 (Los Angeles County Super. Ct. No. CK77292)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.C. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Anthony Trendacosta, Juvenile Court Referee. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant H.C.

Kimberly A. Knill, under appointment by the Court of Appeal, for Defendant and Appellant L.G.

Arezoo Pichval for Plaintiff and Respondent.

L.G. (mother) and H.C. (father) appeal from orders denying their petitions under section 388 of the Welfare and Institutions Code[1] and terminating parental rights to daughter Wendy C. They contend denial of their section 388 petitions was an abuse of discretion and substantial evidence does not support the order terminating parental rights. We affirm.

FACTS AND PROCEDURAL HISTORY

Wendy was born in 2008 to the parents, who were married and lived together.[2] Wendy's twin sister and one-year-old brother (the siblings) also lived in the home. Wendy was born with VACTERL syndrome, which consisted of multiple congenital abnormalities, including anomalies of her digestive system, brain, heart, lungs, renal system, and limbs. Wendy spent the first four and one half months of her life in the hospital before she was released to the parents. Father worked during the day and went to school three nights a week, while mother, assisted by a 40-hour per week nurse, was at home with the children.

In May 2009, seven-month-old Wendy was diagnosed with retinal hemorrhages to her eye, fresh subdural posterior faults in her brain, and acute and non-acute subdural hematomas in different stages of healing, which were consistent with violent shaking, spinning, or strangulation. The parents gave no explanation. Wendy and the siblings were detained from parental custody on May 13, 2009, and a dependency petition was filed. Wendy was placed in the care of Mr. and Mrs. M.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 The dependency court found father to be Wendy's presumed father.

On November 16, 2009, Wendy was declared a dependent of the court,[3] based on sustained allegations under section 300, subdivisions (a) (physical abuse inflicted nonaccidentally) and (e) (young child suffered severe physical abuse by parent or person known by the parent if parent reasonably knew of the abuse). The dependency court found Wendy's injuries were the result of nonaccidental trauma that would not ordinarily occur except as the result of deliberate, unreasonable, and neglectful acts of the parents. "[W]e may never know who [is] responsible, actually responsible. But that's really not the issue before the court. . . . The child was in the care, custody and control of the parents. They are the only ones who essentially had the total care, custody and control. Yes, the nurse was there. But nurse was there while mother was there. So I don't know that we will know the actual perpetrator." The court found there were "clearly two separate incidents causing bleeding."

Custody was taken from the parents. The Department was ordered to provide reunification services. The court stated the case involves "very unsophisticated parents living as close to the bone as they possibly can be. Father is working all day, trying to make the better of himself and for his family. They're living in a very confined space. Mother is left alone with three children, one of which is medically fragile, [another] of which is hyperactive. It's not surprising that someone would react the way in which one would presume mother reacted in this context. And I . . . look at this case in that context, and [our] obligation at that point is to try to provide those services to the parents so they learn what happened, why it happened, how it may not happen in the future." The parents were granted monitored visits and ordered to participate in counseling with a licensed therapist. In the summer of 2010, visitation increased from two to three monitored visits per week.

On two occasions, the parents failed to administer all the syringes of water they were supposed to administer through Wendy's G-tube. In September 2010, mother told the son to "shut up" three times when he made loud noises. Father looked alarmed as

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[3] The siblings were also declared dependents of the court.

mother did this. In October 2010, Mr. M., who was the visitation monitor, observed mother become angry with the son, now three years old, and slap his face after he acted out by spitting on her, kicking her, and telling her he did not love her. Father intervened to separate the son from mother. Mother blamed Mr. M. for encouraging the son's misbehavior. On a subsequent visit, the son told mother to "shut up," and mother became upset and responded "shut up" to him.

The parents denied mother hit the son, ever exhibited anger toward the children, or ever made threats to the children. Mother denied telling the son, "shut up."

The parents paid little attention to Wendy during visits, as they were consumed by trying to handle the siblings' acting-out behaviors. The parents did not apply what they had learned in parenting classes and therapy to their parenting of the siblings. They did not control and redirect the siblings when the siblings acted up. The parents never asked to visit with Wendy separately. The siblings manipulated the parents, controlled the interactions, and distracted the parents from paying attention to Wendy.

The parents received medical training to care for Wendy. The parents continued to state they did not know who injured Wendy, but they blamed the in-home nurse. Their plan for protecting Wendy in the future was to interview another in-home nurse to make sure she was safe.

The parents failed to reunify with Wendy. On January 4, 2011, the dependency court terminated reunification services and set the matter for a section 366.26 hearing (setting order) on May 3, 2011.[4] The Department was granted discretion to liberalize parents' visits. The court found return of Wendy to the parents' custody would create a substantial risk of detriment, and although the parents were in compliance with the case plan, they "failed to make substantive progress. Failure to make substantive progress in court-ordered treatment constitutes prima facie evidence return would be detrimental." The parents were unable to properly direct and supervise the siblings during visits. Most

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[4] The dependency court also terminated reunification services and set the matter for a section 366.26 hearing for the siblings.

significantly, neither parent accepted responsibility for the trauma inflicted on Wendy. The parents blamed the in-home nurse for Wendy's injuries and blamed others for the course this case was taking. The court found not credible the opinion of the parents' therapist, who recommended the children be returned to parental custody.

Mr. and Mrs. M., who were full-time foster parents of medically fragile children, were devoted to Wendy and wanted to adopt her. Wendy thrived in their care, made significant improvements, and was very attached to them. She was medically fragile, required specialized care and attention, and had many medical appointments. Mr. and Mrs. M. were approved to adopt Wendy.

During visitation following the setting order hearing, the parents continued to allow the siblings to manipulate them and monopolize their attention, and they allowed Wendy to spend most of the time in her seat playing by herself. The parents continued to state they did not know how Wendy sustained her injuries. Father separated from mother because the parents had been advised father had a better chance of having the children returned to his care if he did not live with mother. The parents often did not follow basic instructions about Wendy's care during visits, which resulted in Wendy getting pneumonia.

On October 17, 2011, mother filed a section 388 petition requesting that Wendy and the siblings be returned to her custody or that visitation be liberalized. Mother alleged she had been in individual therapy three times per week for a month, participated in Wendy's occupational therapy, regularly visited, and re-enrolled in a parenting class. She alleged return to her custody was in Wendy's best interest, in that there was a strong parent-child bond.

On October 18, 2011, father filed a section 388 petition asking the dependency court to return Wendy[5] to his custody or to reinstate reunification services.[6] He alleged

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[5] Father also requested the siblings be returned to his custody.

[6] This was father's second section 388 petition requesting return to his custody or reinstatement of reunification services. The earlier petition was denied on June 28, 2011.

his therapist believed him capable of parenting his children, he had an appropriate home, he visited regularly, and he had knowledge about Wendy's medical conditions. He alleged he was bonded to Wendy.

Wendy opposed the petitions. On October 25, 2011, the section 388 petitions were denied on the basis that the requested relief was not in Wendy's best interest. Wendy regarded her caretakers as her parental figures. Because the parents never moved beyond monitored visitation and never took responsibility for Wendy's injuries, reunification would be a long and speculative process. With Wendy in a pre-adoptive home, this delay in permanency was not in her best interest.

The section 366.26 hearing took place on November 4, 2011. Parental rights were terminated. The dependency court found Wendy was adoptable. The family she had been living with for two years was ready, willing, and able to adopt her and had an approved home study. The court found no compelling reason for finding that an exception to termination applied. "The parents still have not accepted responsibility. So what is the end game here? The end game is to develop some sort of strong relationship. I'm not exactly sure how you can have a strong relationship when you still don't accept your responsibility for what's happened to this child. [¶] Secondly and more importantly, in balancing the relationship between the parents and Wendy and the child and the current caretakers, . . . this child has been in the care of the current caretakers for two years. The child was in the care of her parents for approximately three months. [¶] The sibling relationship, such as it exists -- this child has not resided with [the siblings] for any significant period of time. All of their visits have been monitored. And then when you balance that, as indicated, against the interests and the dedication that the caretakers have [shown], how they've accepted this child in the home, attended to the child, all of the child's medical needs every day and every night for two years, and accepted this child . . . into their family, when you balance that against that even with the dedication that the parents have, there just isn't any contest. [¶] . . . [T]o the extent that I accept the parents' interpretation of Wendy's relationship to them as 'a strong bond' or 'a bond,' it is clearly not the type of bond or the strong bond that this child has, as indicated

in the evidence, with the current caretakers on a day-to-day basis for the last two years. They're involved in all aspects of [her] life, attending to all of [her] medical needs, . . . going to numerous medical appointments, attending to the child, facilitating the visits. This child has, I think, developed as well as she possibly can due to that dedication. And it's in balancing that against the parents' relationship, and quite honestly the evidence that has been presented to me is the effect on the parents and the parents' feeling and views, not the effects or the real impact on . . . Wendy."

DISCUSSION

I. Denial of the Parents' Section 388 Petitions Was Not an Abuse of Discretion

Under section 388,[7] the dependency court should modify an order if circumstances have changed such that the modification would be in the child's best interest. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 & fn. 5.) We review the ruling for abuse of discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) Once reunification services are terminated, the focus shifts from reunification to the child's need for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Disrupting an existing psychological bond with caretakers is not in a child's best interest. (*In re Kimberly F.*, *supra*, at p. 531.) Moreover, time is of the essence, especially to young children, when it comes to securing a stable, permanent home for children; prolonged uncertainty is not in their best interest. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 674; see § 361.5, subd. (a)(1)(B) [with certain exceptions, parents of children under the age of three years when detained have six months to reunify].)

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[7] Section 388 provides in pertinent part that a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

Reinstating the parents' reunification services would delay permanency for this young, medically fragile child, whose status was in limbo for nearly two and a half years. During that time, she lived and bonded with Mr. and Mrs. M., who provided her with the supervision and services she required to survive. The M.'s wanted to make her a permanent member of their family, and they were approved to adopt her. The parents' circumstances had not substantially changed since reunification services were terminated. They still did not acknowledge their responsibility for Wendy's injuries and had not moved beyond monitored visits. Achieving reunification would be time-consuming and entirely speculative. The dependency court did not abuse its discretion in concluding that delaying permanency was not in Wendy's best interest.

II. Substantial Evidence Supports the Finding That the Exception in Section 366.26, subdivision (c)(1)(B)(i), Does Not Apply

The parents contend the dependency court abused its discretion in terminating parental rights, because they presented sufficient evidence of the exception to termination under section 366.26, subdivision (c)(1)(B)(i). We disagree with the contention.

We apply the substantial evidence rule to review a challenge to the finding the exception did not apply. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; compare *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [abuse of discretion standard of review].)[8] If supported by substantial evidence,

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[8] "The practical differences between the two standards of review [substantial evidence and abuse of discretion] are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . ."' [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a 'compelling reason for determining that termination would be detrimental to the child.' (§ 366.26, subd. (c)(1)[(B)].) That is a quintessentially discretionary determination. The juvenile court's

the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding on the section 366.26, subdivision (c)(1)(B)(i), exception is challenged is whether substantial evidence supports the finding, not whether a contrary finding might have been made. "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] '"[The] [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]."' [Citations.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321; see also *In re Dakota H.*, *supra*, at p. 228 ["[w]e do not reweigh the evidence"].)

Under section 366.26, subdivision (c)(1)(B)(i), if reunification services have been terminated and the child is adoptable, the dependency court must terminate parental rights unless it "finds a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

"'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] . . . 'The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.' [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) "At this stage of the proceedings, if an appropriate adoptive family is or likely will be available, the Legislature has made adoption the preferred choice. [Citation.]" (*Id.* at

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opportunity to observe the witnesses and generally get 'the feel of the case' warrants a high degree of appellate court deference." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

p. 49; see also § 366.26, subd. (b)(1) [adoption is the preferred plan].) "'[I]t becomes inimical to the interests of the [child] to heavily burden efforts to place the child in a permanent alternative home.' [Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.*, *supra*, at p. 53.)

"[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The type of parent-child relationship that triggers the exception is a relationship which "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . .' [Citation.]" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D.*, *supra*, at pp. 1347-1350.)

Substantial evidence supports the finding that no exceptional circumstance existed under section 366.26, subdivision (c)(1)(B)(i) that required depriving Wendy of a permanent, adoptive home. Substantial evidence establishes that the parents' relationship with her did not promote her well-being "'to such a degree as to outweigh the well-being [she] would gain in a permanent home with [a] new, adoptive parent[]. . . .' [Citation.]" (*In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1534.) Wendy spent nearly her entire life out of the parents' care. During the brief time she was in their care, when she was an infant, Wendy suffered physical traumas inflicted nonaccidentally on multiple occasions as the result of the parents' deliberate, unreasonable, and neglectful acts. The parents never acknowledged their role in the abuse. There was evidence the parents focused their attention on the siblings, not Wendy, during visits. Wendy thought of Mr. and Mrs. M. as her parents. The M.'s provided the services and attention she needed. Mr. and Mrs. M. were ready, willing, and able to provide Wendy with permanency.

The conclusion reached by the dependency court that no compelling reason existed to conclude termination of parental rights would be detrimental to Wendy is amply supported by substantial evidence and not an abuse of discretion.

DISPOSITION

The order is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.